

December 13, 2011

J. Christine Dietrick
City Attorney
990 Palm Street
San Luis Obispo, CA 93401-3249

**RE: Your Request for Advice
Our File No. A-11-200**

Dear Ms. Dietrick:

This letter is in response to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the “Act”).¹ Please note this letter is based on the facts presented. The Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) There are other bodies of law, separate and apart from the Act’s conflict-of-interest provisions that may apply to the situation you have described. We urge you to check with the Attorney General’s office to determine whether any other laws are applicable in light of the facts you present.

QUESTIONS

1. Does the Act prohibit members of the Planning Commission from participating in decisions regarding the adoption of (i) the state’s designation of very high fire hazard areas, or (ii) an alternate designation by the San Luis Obispo Fire Department that would include additional areas, if the commissioners own real property in or within 500 feet of the additional areas?

2. Does the Act prohibit the Assistant City Attorney from advising the Planning Commission regarding adoption of the state’s designation or the alternate designation if she owns real property located within 500 feet of the additional areas?

CONCLUSIONS

1 & 2. Yes. The decisions will have a reasonably foreseeable material financial effect on each of their economic interests in real property.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

FACTS

State regulations require the identification of lands within very high fire hazard severity zones (“Very High Zones”). The California Department of Forestry and Fire Protection (Cal Fire) has formulated a map (the “Fire Hazard Map”) designating these zones. The Fire Hazard Map includes land within the City of San Luis Obispo (the “City”), as well as land in unincorporated areas.

The City’s Building Code requires more stringent construction standards for Very High Zone areas, as well as an area called the Wildland-Urban Interface (the “WUI Area”). There is no specific mapping for the WUI Area. Each community makes a determination whether to designate an area as a WUI Area, separate from Cal Fire’s designation in the Fire Hazard Map.

The City uses the Fire Hazard Map in its Safety Element of the General Plan. With recent changes to the Fire Hazard Map, the City must amend its Safety Element and maps to reflect these changes. The City, however, retains discretion to identify other potential fire hazard areas in its amendments to the Safety Element and map. The updated map will be used by the City to determine the appropriate building standards for new construction and to address plans for new development. Property owners use these maps to comply with the natural hazards real estate disclosure requirements upon sale of a property.

The City’s Community Development Department is recommending that the Planning Commission recommend to the City Council (i) adoption of the Fire Hazard Map, and (ii) amendment of the General Plan to suggest building code amendments that would include more restrictions on building in areas at high risk of wildland fire.

It is staff’s practice to present the Planning Commission and the City Council with alternatives to a recommended action. One such alternative would be to designate the San Luis Obispo Fire Department “Wildland Interface Pre-Fire Area” map (“SLOFD Map”) as the WUI Area (the “Alternate WUI Area”). The SLOFD map increases the WUI Area, not only around the state’s mandated Very High Zone, but also around the City’s edge. There are 3,525 residents in the Very High Zones and the Alternate WUI Area. The 2010 census reflects the City’s population at 44,948. In addition, the Planning Commission may consider extending the WUI Area suggested by the San Luis Obispo Fire Department, which would put a greater number of properties in the WUI Area.

Commissioners Multari, Whittlesey and Drazé each own real property located in the Alternate WUI Area. Commissioner Singewald owns a condominium and has a non-exclusive easement in his community’s common areas, some of which are located in the Alternate WUI Area. Assistant City Attorney Visveshwara owns real property located within 500 feet of the Alternate WUI Area. The commissioners and Ms. Visveshwara are collectively referred to herein as the “City Officials.”

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. The Commission has adopted an eight-step standard analysis for deciding whether an official has a disqualifying conflict of interest. (Regulation 18700(b).) The general rule, however, is that a conflict of interest exists whenever a public official makes a governmental decision which has a reasonably foreseeable material financial effect on one or more of his or her financial interests. (Regulation 18700(a).)

Step 1. Are the City Officials “public officials” within the meaning of Section 87100?

The Commissioners

Under Section 87200, members of a planning commission are public officials.

Assistant City Attorney Visveshwara

Section 82048 defines “public official” as “any member, officer, employee or consultant of a state or local government agency.” “Local government agency” is defined to include cities. (Section 82041.) As a City employee, Ms. Visveshwara is a public official.

Step 2. Will the City Officials be making, participating in making, or using their official positions to influence a governmental decision?

A public official “makes a governmental decision” when the official, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (Regulation 18702.1.)

A public official “participates in a governmental decision” when, acting within the authority of his or her position and without significant intervening substantive review, the official negotiates, advises, or makes recommendations to the decisionmaker regarding the governmental decision. (Regulation 18702.2.)

A public official is attempting to use his or her official position to influence a decision if, for the purpose of influencing, the official contacts or appears before any member, officer, employee, or consultant of his or her agency. (Regulation 18702.3.)

Planning Commissioners

When the commissioners make decisions to recommend actions by the City council regarding the State Fire Hazard Map, the SLOFD map and alternative designations of the WUI

Area, they will be making, participating in making and influencing a governmental decision. (Regulations 18702.2 and 18702.3 (a).)

Assistant City Attorney Visveshwara

As the Assistant City Attorney, Ms. Visveshwara presumably exercises judgment and influences governmental decisions by advising and making recommendations to the City Council, Planning Commission or City staff. If her advice is given “without significant intervening substantive review,” Ms. Visveshwara is not deemed to have participated in making the decision. Ms. Visveshwara must look at each decision on a case-by-case basis. For example, it may be common for the City Attorney to review and approve advice before it goes to a decisionmaker, but occasionally Ms. Visveshwara gives advice directly, without review, to the Planning Commission. For this reason, advice as to each decision must be analyzed separately.

Step 3. What are the City Officials’ economic interests?

The Act’s conflict-of-interest provisions apply only to conflicts of interest arising from certain enumerated economic interests. These economic interests are described in Section 87103 and Regulations 18703-18703.5, inclusive:

- A public official has an economic interest in a business entity in which he or she has a direct or indirect investment of \$2,000 or more. (Section 87103(a); Regulation 18703.1(a).)
- A public official has an economic interest in a business entity in which he or she is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d); Regulation 18703.1(b).)
- A public official has an economic interest in real property in which he or she has a direct or indirect interest of \$2,000 or more. (Section 87103(b); Regulation 18703.2.)
- An official has an economic interest in any source of income, including promised income, totaling \$500 or more within 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.)
- A public official has an economic interest in any source of gifts to him or her if the gifts total \$420 or more within 12 months prior to the decision. (Section 87103(e); Regulation 18703.4.)
- A public official has an economic interest in his or her personal expenses, income, assets, or liabilities, as well as those of his or her immediate family. This is commonly referred to as the “personal financial effects” rule. (Section 87103; Regulation 18703.5.)

Real Property

Planning Commissioners

Commissioners Multari, Whittlesey and Drazz each own real property located within the WUI Area. Thus, each of them has an economic interest in their real property. Commissioner Singewald owns a condominium and has a non-exclusive easement in his community's common areas, some of which are located within 500 feet of the Alternate WUI Area. An interest in a condominium unit and the common area of the unit is a single property interest.² Accordingly, Commissioner Singewald has a real property economic interest in property located within 500 feet of the Alternate WUI Area. (Regulation 18704.2(a)(1).)

Assistant City Attorney Visveshwara

Ms. Visveshwara owns real property within 500 feet of the Alternate WUI area. Thus, she has an economic interest in her real property.

Personal Finances

We point out that public officials always have an economic interest in their personal finances. However, a financial effect on the value of real property owned directly or indirectly by a public official is not considered a separate financial effect on the official's personal finances and would not be analyzed separately under the "personal financial effects" rule. (Regulation 18705.5(a).) Accordingly, the personal financial effects rule does not appear to apply to the circumstances and we will not discuss it further.

Step 4. Will the economic interests of the City Officials be directly or indirectly involved in decisions they will make, participate in making or influence as a public official?

Real Property

Under Section 18704.2(a)(1), real property is directly involved in a governmental decision if:

"(1) The real property in which the official has an interest, or any part of that real property, is located within 500 feet of the boundaries (or the proposed boundaries) of the property which is the subject of the governmental decision. For purposes of subdivision (a)(5), real property is located 'within 500 feet of the boundaries (or proposed boundaries) of the real property which is the subject of the governmental decision' if any part

² The Commission has advised in the past regarding condominium ownership that the common areas surrounding a condominium complex has no separate marketable value from the condominium unit. (*Munoz*, Advice Letter, No. I-07-129.) We have therefore advised that an interest in a condominium unit is inseparable from the interest in the common areas. (*Id.*)

of the real property is within 500 feet of the boundaries (or proposed boundaries) of the redevelopment project area.”

Because the real property in which the City Officials have an economic interest is located in, or within 500 feet of, the Alternate WUI Area, the property is deemed to be directly involved.³

Step 5. What is the applicable materiality standard?

A conflict of interest may arise only when the reasonably foreseeable financial effect of a governmental decision on a public official’s economic interest is material. (Regulation 18700(a).)

The financial effect of a governmental decision on real property that is directly involved in the governmental decision is presumed to be material. This presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have *any* effect on the real property. (Regulation 18705.2(a)(1).) Thus, “any financial effect” includes an effect that is as small as a penny’s worth, and nothing in the facts you have presented indicates that the presumption of materiality is rebutted.

Step 6. Is it reasonably foreseeable that the financial effects of the governmental decision on the City Officials’ economic interests will meet the applicable materiality standard?

Whether the financial consequences of a decision are reasonably foreseeable at the time a governmental decision is made depends on the facts of each particular case. A material financial effect on an economic interest is “reasonably foreseeable” if it is substantially likely that one or more of the materiality standards will be met as a result of the governmental decision. (Regulation 18706(a).) An effect need not be certain to be considered “reasonably foreseeable,” but it must be more than a mere possibility. (*In re Thorner* (1975) 1 FPPC Ops. 198.)

Ultimately, whether a material financial effect is foreseeable at the time a decision is made depends on facts and circumstances peculiar to each case. Because the Commission does not act as a finder of fact in providing advice (*In re Oglesby*, *supra*), the foreseeability of a particular financial effect is a determination that must be left, in most instances, to the informed judgment of the official.

Planning Commissioners

You have indicated that the City’s Building Code places more stringent construction standards on real property located in the WUI Area. These standards would apply to new construction and plans for development. It is conceivable that an owner of property in the alternate WUI Area may wish to build additional buildings on the property, or replace existing structures with new ones. If that were to occur, the designation of the WUI Area to include the

³ When a public official has an interest in one of two alternative options within a decision, the public official is disqualified as to the entire decision.

City Officials' properties would most likely affect the value of the property by at least one penny.

You also state that sellers of property located in a WUI Area have a duty, under the natural hazards real estate disclosure laws, to disclose to buyers that the property is located in the WUI Area. Presumably, the purpose of these disclosure laws is to advise a buyer of conditions that would adversely affect the property and its value.

Under these circumstances, decisions regarding the state's Fire Hazard map, the SLFOD map and alternative designations of the WUI Area will have a reasonably foreseeable material financial effect on the Planning Commissioners' economic interests.

Assistant City Attorney Visveshwara

Ms. Visveshwara does not own real property in the WUI Area, but, rather, within 500 feet of the WUI Area. Rights or duties involving construction, or duties do disclose adverse conditions, on property in the WUI Area would not have the same effect on property located outside of the WUI Area, but within 500 feet of the area. As stated above, because the Commission does not act as a finder of fact in providing advice, the foreseeability of a particular financial effect is a determination that must be left, in most instances, to the informed judgment of the official. Because we have no information regarding facts or circumstances as to the decision's possible effects on Ms. Visveshwara's real property, we leave this determination to Ms. Visveshwara's judgment.

Steps 7 and 8. The "public generally" and "legally required participation" exceptions.

Even if a material financial effect on a public official's economic interest is reasonably foreseeable, he or she still may not be disqualified if the financial effect of the governmental decision on the public official's economic interest is indistinguishable from its effect on the public generally (Section 87103, Regulations 18700(b)(7) and 18707(a)), or if the official is legally required to participate (Section 87103; Regulation 18708). You have not presented any facts indicating that either of these exceptions is applicable to the Public Officials' situation.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Valentina Joyce
Counsel, Legal Division

VJ:jgl